

2014 WL 3636476 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Central Justice Center
Orange County

John A. CANTU, an individual, Yolanda Caperon, an individual, Plaintiffs,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, a private corporation, Bank of America, NA, a National
association, Quality Loan Service Corp., a California corporation, and Does 1 - 50, inclusive, Defendants.

No. 30201300676055.
March 25, 2014.

Date: June 23, 2014

Time: 1:30 p.m.

Place: Dept. C-23

Reservation #: 71922476

Compl. Filed: September 17, 2013

FAC Filed: February 21, 2014

[Filed concurrently with Defendants' Request for Judicial Notice iso Demurrer to Fac; and [Proposed] Order and Judgment]

[Telephonic appearance requested pursuant to Crc 3.670(h)(1)(a).]

**Defendants' Notice of Demurrer and Demurrer to Plaintiffs' First Amendend
Complaint; Memorandum of Points and Authorities in Support Thereof**

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Honorable [Frederick P. Aguirre](#).

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TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on June 23, 2014 at 1:30 p.m., or as soon thereafter as it may be heard, in Department C-23 of the above-referenced court, located at 700 Civic Center Drive West, Santa Ana, CA 92701, Defendants Federal Home Loan Mortgage Corporation and Bank of America, N.A. (collectively, “Defendants”) will and hereby do demur to the First Amended Complaint (“FAC”) filed in this action against Defendants by Plaintiffs John A. Cantu and Yolanda Caperon (collectively, “Plaintiffs”), and to each cause of action asserted therein against Defendants. This Demurrer is brought pursuant to [Code of Civil Procedure section 430.10\(e\)](#) on the grounds that the FAC fails to state facts sufficient to constitute any cause of action against Defendants.

Pursuant to the California Rules of Court, the Court will make a tentative ruling on the merits of this matter by 12:00 p.m. on the Friday before the Monday hearing. You may access the court's ruling from the court's website at <http://www.occourts.org/rulings>. No supplemental or additional papers will be allowed to be submitted following posting of the ruling on the internet, nor will the Court entertain a request for continuance once the ruling has been posted. The Court will hear oral argument on all matters at the time noticed for the hearing. If you intend to submit on the tentative and do not want oral argument, please notice the clerk by calling (657) 622-5226 and the prevailing party will give Notice of Ruling or prepare an Order if appropriate per California Rules of Court, rule 3.1312.

The Demurrer is based upon this Notice of Demurrer, the Memorandum of Points and Authorities attached hereto, the FAC and pleadings on file with the Court in this matter, all matters of which this Court may properly take judicial notice, and any other evidence or oral argument as the Court may consider in connection with this Demurrer.

Defendants requests to appear telephonically pursuant to California Rules of Court, rule 3.670(g)(1)(A).

To the extent a *lis pendens* is recorded against the property at issue, located at 16641 East Buena Vista Avenue, Orange, CA 92865 (the "Property"), Defendants request that it be expunged.

DATED: March 25, 2014

REED SMITH LLP

By:

Tina Sundar (SBN 288022)

Attorneys for Defendants

Federal Home Loan Mortgage Corporation and Bank of America, N.A.

DEMURRER

Defendants Federal Home Loan Mortgage Corporation and Bank of America, N.A. (collectively, "Defendants") hereby demurs to the First Amended Complaint ("FAC") of Plaintiffs John A. Cantu and Yolanda Caperon (collectively, "Plaintiffs") on the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

1. Defendants demur to Plaintiffs' first cause of action for Breach of Contract on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO SECOND CAUSE OF ACTION

2. Defendants demur to Plaintiffs' second cause of action for Breach of the Implied Covenant of Good Faith and Fair Dealing on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO THIRD CAUSE OF ACTION

3. Defendants demur to Plaintiffs' third cause of action for Violation of [Bus. & Prof. Code § 17200 et seq.](#) (“UCL”) on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO FOURTH CAUSE OF ACTION

4. Defendants demur to Plaintiffs' fourth cause of action for Wrongful Foreclosure on the grounds that it fail to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO FIFTH CAUSE OF ACTION

5. Defendants demur to Plaintiffs' fifth cause of action to Vacate and Set Aside Foreclosure Sale on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO SIXTH CAUSE OF ACTION

6. Defendants demur to Plaintiffs' sixth cause of action for Cancellation of Trustee's Deed Upon Sale on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO SEVENTH CAUSE OF ACTION

7. Defendants demur to Plaintiffs' seventh cause of action to Quiet Title on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO EIGHTH CAUSE OF ACTION

8. Defendants demur to Plaintiffs' eighth cause of action for Intentional Infliction of Emotional Distress on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO NINTH CAUSE OF ACTION

9. Defendants demur to Plaintiffs' ninth cause of action for **Elder Abuse** on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

DEMURRER TO TENTH CAUSE OF ACTION

10. Defendants demur to Plaintiffs' ninth cause of action for Declaratory Relief on the grounds that it fails to state facts sufficient to constitute a cause of action against Defendants. [Code Civ. Proc. § 430.10\(e\)](#).

WHEREFORE, Defendants pray:

1. That their Demurrer be sustained as to all Causes of Action asserted against Defendants in Plaintiffs' First Amended Complaint without leave to amend;
2. That the matter be dismissed with prejudice;
3. To the extent a *lis pendens* is recorded on the property at issue, commonly known as 16641 East Buena Vista Avenue, Orange, California 92865 (the “Property”), that it be expunged;

4. For its costs and fees incurred in this action; and
5. For such other relief as the Court may deem just and appropriate.

DATED: March 25, 2014

REED SMITH LLP

By:

Tina Sundar (SBN 288022)

Attorneys for Defendants

Federal Home Loan Mortgage Corporation and Bank of America, N.A.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Prior to Defendants Bank of America, N.A. (“BANA”) and Federal Home Loan Mortgage Corporation (“Freddie Mac”) (collectively, “Defendants”) response to the original Complaint, Plaintiffs John A. Cantu and Yolanda Caperon, who is deceased (“Plaintiffs”), filed the instant First Amended Complaint (“FAC”) which does nothing to remedy their pleading's fatal defects. The fact remains that *over seven years* after obtaining and admittedly defaulting on their mortgage loan, Plaintiffs seek to hold Defendants liable for their inability to obtain a loan modification, the eventual sale of the Property, and unbelievably for the death of Plaintiff Caperon at the age of 73 last fall. However, Plaintiffs' sparse (and convenient) allegations fail to rebut the presumption of authenticity of the properly notarized and recorded foreclosure documents related to the loan. Defendants initiated non-judicial foreclosure proceedings pursuant to [Civil Code Section 2924](#) upon Plaintiffs' confessed default on their mortgage obligation and yet, in a clear attempt to rescind a valid foreclosure, Plaintiffs now allege that all of the foreclosure-related documents were procured by fraud and forgery. However, Plaintiffs do not come forward with a single specific *fact* to support these self-servicing and perfunctory allegations, nor do they allege facts which would explain how Defendants are liable to them for any of their causes of action. Thus, Plaintiffs fail to state a viable claim against Defendants for at least the following reasons:

- Plaintiff Yolanda Caperon is deceased and thus, lacks the capacity to sue. The entire FAC must be rejected for the failure to join a necessary party, the estate of Yolanda Caperon;
- Plaintiffs' first cause of action for Breach of Contract fails because they do not allege their own performance under their loan and cannot sue to enforce government programs;
- Plaintiffs' second cause of action for Breach of the Implied Covenant Of Good Faith and Fair Dealing fails because they do not allege facts showing a breach of their Deed of Trust and they cannot point to any provision therein that guarantees a loan modification or postponement of a trustee's sale;
- Plaintiffs' third cause of action for Violation of [Bus. & Prof. Code § 17200 et seq.](#) (“UCL”) fails because they do not allege an unlawful or fraudulent acts by Defendants;

- Plaintiffs' fourth, fifth, sixth, and seventh causes of action for Wrongful Foreclosure, to Vacate and Set Aside Foreclosure Sale, Cancellation of Trustee's Deed Upon Sale, and Quiet Title all fail because they fail to allege credible tender and they fail to allege facts showing Defendants violated [Civil Code Section 2924](#);
- Plaintiffs' eighth cause of action for Intentional Infliction of Emotional Distress (“IIED”) fails because they utterly fail to show any extreme or outrageous conduct by Defendants;
- Plaintiffs' ninth cause of action for **Elder Financial Abuse** fails because it is insufficiently pled; and
- Plaintiffs' tenth cause of action for Declaratory Relief fails because there is no actual controversy alleged.

II. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

On or about October 27, 2006, Plaintiffs obtained a \$364,500 mortgage loan (the “Loan”) from BANA, which was secured by a Deed of Trust (“DOT”) on real property located at 16641 East Buena Vista Avenue, Orange, California 92865 (the “Property”). FAC ¶ 9; *see also* Defendants' Request for Judicial Notice (“RJN”), Exh. A. The DOT identifies Plaintiffs as the borrowers, BANA as the lender and beneficiary, and PRLAP, Inc. as the trustee. RJN, Exh. A. On February 28, 2012, BANA substituted in Defendant Quality Loan Service Corporation (“Quality Loan”) as trustee, as evidenced by the Substitution of Trustee (“SOT”) recorded on March 1, 2012. RJN, Exh. B. Upon Plaintiffs' default on their mortgage obligation, Quality Loan recorded a Notice of Default and Election to Sell Under Deed of Trust (“NOD”) on March 19, 2012. RJN, Exh. C. According to the NOD, Plaintiffs were over \$15,269 in arrears on their loan. *Id.* Upon Plaintiffs' failure to cure their default, Quality Loan recorded a Notice of Trustee's Sale (“NOTS”) on June 27, 2012. RJN, Exh. D. Then on July 5, 2012, BANA transferred its beneficial interest in the DOT to Freddie Mac, as evidenced by the Assignment of Deed of Trust (“ADOT”) recorded on November 26, 2012. RJN, Exh. E.

The trustee's sale took place on November 5, 2012 and the Property was sold to Freddie Mac. *See* RJN, Exh. F., p. 3. Quality Loan recorded a Trustee's Deed Upon Sale (“TDUS”) on November 26, 2012 which reflected the sale of the Property to Freddie Mac. *Id.* According the FAC, in the fall of 2013, Plaintiff Caperon passed away at the age of 73. FAC ¶ 127

Plaintiffs filed their Complaint on September 17, 2013, alleging nine causes of action against Defendants. After Defendants were served on February 3, 2014 and before their responsive pleading was due, Plaintiffs filed their FAC on February 21, 2014, alleging the same nine causes of action but adding a tenth claim for **elder financial abuse**. Therein, Plaintiffs make the ridiculous claim that Defendants are somehow responsible for the death of Plaintiff Caperon. FAC ¶ 131. For the reasons stated below, Plaintiffs' FAC fails as a matter of law.

III. LEGAL STANDARD

A demurrer lies to a complaint where a “pleading does not state facts sufficient to constitute a cause of action.” [Code Civ. Proc. § 430.10\(e\)](#). To rule on a demurrer, material facts alleged in a complaint are treated as true. [C&H Foods Co. v. Hartford Ins. Co.](#), 163 Cal. App. 3d 1055 (1984). But a court need not accept “contentions, deductions or conclusions of fact or law.” [Young v. Gannon](#), 97 Cal. App. 4th 209, 220 (2002). Facts stated must be... specific, not vague or conclusionary.” [Rakestraw v. Cal. Physicians' Serv.](#), 81 Cal. App. 4th 39,44 (2000). Where a complaint contains inconsistent allegations, a court need only take as true those allegations that bear most strongly against the plaintiff. [Manti v. Gunari](#), 5 Cal. App. 3d 442,450 (1970). A demurrer should be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defect can be cured by amendment. [Blank v. Kirwan](#), 39 Cal. 3d 311,318 (1985). The burden of proving such reasonable possibility rests squarely on the plaintiff. [Torres v. City of Yorba Linda](#), 13 Cal. App. 4th 1035, 1041 (1993).

IV. LEGAL ARGUMENT

A. Plaintiff Yolanda Caperon Lacks The Capacity To Sue

As a threshold matter, Plaintiff Yolanda Caperon cannot be a named plaintiff if the FAC alleges that she has deceased. FAC ¶ 127; see *Color-Vue, Inc. v. Michael L. Abrams*, 44 Cal.App.4th 1599 (1996); see also *Klopstock v. Superior Court in and for City and County of San Francisco*, 17 Cal.2d 13, 18 (1941). Plaintiff Yolanda Caperon lacks the capacity to sue as a deceased individual, and the only individuals who can bring suit on her behalf are representatives of her estate. See *id.*; see also Code Civ. Proc. § 430.10(b). Thus, Defendants' Demurrer should be granted on this basis alone.

B. Plaintiffs' Entire FAC Fails Because They Have Failed To Join A Necessary Party

A demurrer is appropriate where a complaint makes allegations that reveal a misjoinder of parties. See *Harboring Villas Homeowners Assn. v. Super. Ct.*, 63 Cal. App. 4th 426, 429 (1998). Such defects include the failure to join “necessary parties,” defined as any persons whose presence is required in order to enable court to do complete justice. See, *Harrington v. Evans*, 99 Cal. App. 2d 269, 271 (1950). The standard for compulsory joinder of necessary parties is set forth in Code of Civil Procedure section 389, which provides, in pertinent part:

“A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action **shall be joined as a party in the action if** (1) in his absence complete relief cannot be accorded among those already parties or (2) **he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may** (i) as a practical matter impair or impede his ability to protect that interest or (ii) **leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations** by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.”

Section 389(a)(2)(ii) provides that joinder is required where the existing defendants face a “substantial risk of incurring double, multiple, or otherwise inconsistent obligations.” “Substantial risk” means the possibility of the absent party's asserting a claim that would result in multiple liability. *Id.*

Here, according to the FAC, Plaintiff Caperon died in the fall of 2013. FAC ¶127. Thus, the rightful party to bring suit on her behalf is a representative or trustee of her estate. See Code Civ. Proc. § 430.10(b). If the litigation proceeds without the correct plaintiff, Defendants face a substantial risk of multiple lawsuits, from for example, one brought by the Estate of Plaintiff Caperon. Therefore, Defendants' Demurrer should be sustained for this reason alone.

C. Plaintiffs' Breach Of Contract Claim Fails Because It Is Inadequately Pled And They Cannot Sue To Enforce HAMP

In support of their first cause of action for breach of contract, Plaintiffs allege that Defendants somehow breached the paragraph of their DOT relating to substitution of trustees. FAC ¶ 56-57. Plaintiffs also allege that Defendants violated “applicable Federal Guidelines, internal programs and other Governmental programs” by not granting them a loan modification. *Id.*, ¶¶ 58-59. However, Plaintiffs offer no *facts* to suggest that the SOT appointing Quality Loan as trustee failed to comply with the DOT. See RJN, Exh. B. Further, the federal government programs do not provide a private right of action to enforce its guidelines. Thus, Plaintiffs' claim for breach of contract fails as a matter of law.

1. The SOT Complied with the DOT

Plaintiffs cite to paragraph 24 of the DOT and appear to allege that the SOT appointing Quality Loan as trustee was not recorded and/or failed to contain the names of the original lender, trustee and borrower, the book and page where the DOT was recorded, and the name of the new trustee. FAC ¶ 57. However, the SOT was recorded on March 1, 2012 and does specifically identify the information required. See RJN, Exh. B. (“WHEREAS, JOHN A. CANTU, A SINGLE MAN AND YOLANDA CAPERON, A SINGLE WOMAN, AS JOINT TENANTS, was the original Trustor, PRLAP, INC was the original Trustee, and BANK OF AMERICA, N.A. was the original Beneficiary under that certain Deed of Trust dated 10/27/2006 and recorded on 11/13/20065 as Instrument No. 2006000763818....NOW, THEREFORE, the undersigned hereby substitutes QUALITY LOAN SERVICE CORPORATION, as Trustee under said Deed of Trust.”) Thus, Plaintiffs first claim for Breach of Contract fails as it relates to the SOT.

2. There Is No Private Right Of Action To Enforce Government Programs

To the extent Plaintiffs rely on governmental programs to establish their claim, they also fail. TARP provides no private cause of action, and has no application to an individual's mortgage loan. *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1185 (N.D. Cal. 2009). Similarly, there is no private right of action to enforce HAMP. See 12 U.S.C. § 5201 et seq. Instead, Section 5201 et seq. empowers the Treasury to promulgate rules and programs aimed at mortgage modification. See, e.g., 12 U.S.C. § 5219(a)(1). Simply put, there is no language in the statute supporting a claim that a private right of action exists. Federal district courts have embraced this logic and have agreed that HAMP does not provide borrowers an enforceable right of action. See, e.g., *Gonzalez v. First Franklin Loan Servs.*, 2010 WL 144862, *18 (E.D. Cal. 2010). Here, Plaintiffs allege Defendants breached a contract based by not granting them a loan modification “in accordance with applicable Federal Guidelines,” but of course, a breach of contract claim is a private right of action. FAC ¶¶ 58-59. Thus, their claim fails.

3. Plaintiffs Are Not Intended Third-Party Beneficiaries Of Government Programs

Moreover, Plaintiff's are not third party beneficiaries of any government programs. For a third party to recover on a contract, he must show that the contract was made with the “express or implied intention of the parties to the contract to benefit the third party.” *Klamath Water Users Protective Ass 'n v. Patterson*, 204 F. 3d 1206, 1210 (9th Cir. 1999). An intended beneficiary must be distinguished from an incidental beneficiary, which does not gain rights against the promisor. *Id.* at 1211, n. 2. It is especially difficult to demonstrate third-party beneficiary status in the context of government contracts. *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009). Because government contracts often benefit the public, members of the general public generally are assumed to be incidental beneficiaries, rather than intended beneficiaries, and do not obtain third party beneficiary rights. *Klamath*, 204 F.3d at 1211. In order for a third-party to enforce a government contract, there must be a clear intent to make that party an intended beneficiary. *Id.*¹ More specifically, numerous courts have held that mortgage loan borrowers do not have standing as “intended beneficiaries” of HAMP Participation Agreements. See, e.g., *Escobedo v. Countrywide*, No. 09-CV-1557, 2009 WL 4981618, at *3 (S.D. Cal. Dec. 15, 2009). Here, Plaintiffs do not allege any language from any HAMP agreement that indicates a “clear intent” to confer any third party beneficiary rights upon them specifically. See FAC ¶ 58. Therefore, they are not intended beneficiaries and do not possess standing to enforce HAMP. Thus, since Plaintiffs are neither parties to, nor intended third party beneficiaries of, the HAMP or SPA, they lack standing to assert a claim based on an alleged breach of such an agreement. See *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38,49 (1990). Accordingly, Plaintiffs' cause of action for breach of contract as a third party beneficiary fails.

4. There Is No Right To A Loan Modification

Throughout their FAC, Plaintiffs reference their theory that they have a “right” to a loan modification and that Defendants deprived them of this “right.” See FAC ¶¶ 18, 58-59, 97-100, 116. However, in California, lenders and services have *no statutory duty to modify a borrower's loan*. See *Mabry v. Superior Court of Orange County*, 185 Cal. App. 4th 208, 214 (2010); (“There is nothing in section 2923.5 that requires the lender to rewrite or modify the loan “); see also *Ortiz v. Accredited Home Lenders, Inc.*, 639 F.Supp.2d 1159, 1166 (S.D. Cal. 2009). In the case of *Ottolini v. Bank of Am., N.A.*, No. 11-CV- 2011, WL 3652501,

at *7 (N.D. Cal. Aug. 19, 2011), the Court stated that “there is no duty owed by the [defendant lender] to [the plaintiff] with respect to his attempt to submit a loan modification application.”²

Likewise, Plaintiffs' DOT does not contractually obligate Defendants to modify their loan. *See* RJN, Exh. A. Although Plaintiffs contend their claim is premised on the promissory note and DOT (FAC ¶ 56, 58), the only provision of the DOT they cite relates to the SOT, which as discussed above, fails as a matter of law. *Id.* ¶ 57. Indeed, Plaintiffs cannot point to any terms of the DOT that either relate to or guarantee them a modification. *See* RJN, Exh. A. Thus, Plaintiffs breach of contract claim fails entirely.

5. The “Holder Of The Note” Theory Has Been Soundly Rejected

Plaintiffs also seem to allege that Defendants have somehow breached their DOT by failing to “present[] the original Note” prior to initiating nonjudicial foreclosure. FAC ¶61. However, in California, possession of the original note is not a prerequisite to foreclosure. *See Puttkuri v. ReconTrust Co.*, 2009 WL 32567, at *2 (S.D. Cal. Jan. 5,2009). California courts have also uniformly rejected the “separation of the note” and “original note” theories. *See, e.g., Christopher v. First Franklin Fin. Corp.*, 2010 WL 1780077, at *2 (S.D. Cal. Apr. 30,2010). Civil Code section 1084 provides: “The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.” In the context of mortgages, this section has been interpreted to pass the debt upon assignment of a mortgage, giving the assignee the right to foreclose. *Storch v. McCain*, 85 Cal. 304, 306-307 (1890). In the same vein, Civil Code section 2936 provides that a deed of trust or mortgage is “inseparable from the debt,” and therefore when assigned, the debt is transferred as well. *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1969).³ Therefore, to the extent Plaintiffs try to claim that Defendants must have been the holder of the Note in order to foreclose, their claim fails entirely.

D. Plaintiffs' Breach Of The Implied Covenant Of Good Faith And Fair Dealing Claim Fails Because It Is Inadequately Pled

Plaintiffs' second claim for breach of the implied covenant of good faith and fair dealing seems to be based on their allegations that Defendants “misrepresented” that the foreclosure sale had been postponed. *See* FAC ¶59. However, Plaintiffs cannot show breach of any express provision of any *express contract* with Defendants, and thus, their claim fails.

The covenant of good faith and fair dealing ensures that neither party will do anything to deprive the other party of the benefits of the contract. 1 B.E. Witkin, *Summary of California Law, Contracts* § 798 (10th ed. 2005). The implied covenant is limited to “assuring compliance with the *express terms of the contract.*” *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1093-94 (2004) (emph. added). It does not impose additional obligations on the parties. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50 (2000). Moreover, “the implied covenant [supplements] existing contract, and... does not require parties to negotiate in good faith.” *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 799 (2008).

Here, Plaintiffs fail to articulate how they have been deprived of “the benefits of the contract.” 1 B.E. Witkin, *Summary of Cal. Law, Contracts*, § 798 (10th ed.). Indeed, they do not deny that they received over \$360,000 in loan proceeds and subsequently defaulted on their loan obligations. FAC ¶¶ 9, 24, 95(a)-(b). It appears Plaintiffs' claim is based on their conclusory allegations that Defendants “misrepresent[ed] to Plaintiffs that the subject Trustee Sale had been postponed and would not be going forward. so that Plaintiffs could consider and pursue other available options...” FAC ¶ 59. However, they do not point to any express term in the DOT that Defendants are alleged to have violated, and as such, there is no covenant that illustrates their vague recitations. Moreover, they do not allege nor attach any written agreement by Defendants to forego exercising their rights under Section 2924 to conduct a trustee's sale. Thus, Plaintiffs' second claim fails as a matter of law.

E. Plaintiffs' UCL Claim Fails Because They Fail To Allege Proscribed Conduct

In their third cause of action, Plaintiffs fail to adequately allege that Defendants committed any unlawful, unfair, or fraudulent business acts or practices precluded by the statute. Under the “unlawful” prong, the UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). Under a “fraud” theory, a plaintiff must show that “members of the public are likely to be ‘deceived’” by the defendant’s practices. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002)). “Unfair” conduct in UCL actions must be violative of a public policy “tethered to specific constitutional, statutory, or regulatory provisions.” *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 940 (2003). “A plaintiff alleging unfair business practices [under the UCL] must state *with reasonable particularity* the facts supporting the statutory elements of the violation.” *Khoury v. Maly’s of Cal.*, 14 Cal. App. 4th 612,617 (1993) (emph. added). Further, where a plaintiff premises his UCL claim on statutory violations, but fails to establish the underlying violations, the UCL claim fails as well. *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001).

Here, as discussed in Sections IV(C)-(D) and (F)-(I), Plaintiff’s do not plead their claim for violation of the UCL with particularity. Plaintiffs’ allegations are purely speculative in nature and are not supported by any statements of fact that evidence unlawful or fraudulent conduct. Instead, Plaintiffs appear to base their UCL claim on multiple theories: (1) that Defendants are not the true owners of the DOT and wrongfully executed the NOD, NOTS, and TDUS; (2) that Defendants wrongfully foreclosed; (3) that the securitization of Plaintiffs’ DOT is somehow illegal; and (4) their “holder of the Note” theory. FAC ¶¶ 70-81. However, none of Plaintiffs’ claims contain any merit. Thus, they cannot proceed under the “unlawful” prong. Further, Plaintiffs also do not assert any *facts* demonstrating that “members of the public” are likely deceived by Defendants’ purported conduct, besides broadly alleging that “Plaintiffs brings this action on behalf of themselves and on behalf of the general public.” *Id.* ¶ 83. Additionally, Plaintiffs do not allege which Defendant committed which alleged unlawful conduct. *Id.* ¶¶ 67-92. Thus, Plaintiffs fail to plead their UCL claim with the requisite particularity. Finally, Plaintiffs allege no facts under the unfair prong indicating Defendants’ actions were violative of public policy or “tethered to specific constitutional, statutory, or regulatory provisions.” See *Scripps Clinic*, 108 Cal. App. 4th at 940.

1. Securitization Does Not Affect The Parties’ Obligations Under The DOT

To the extent Plaintiffs claim that the purported securitization of their loan somehow constitutes a violation sufficient for UCL, they are mistaken. See FAC ¶¶ 77-82. Not only does Plaintiffs’ DOT explicitly provide that the Note or a partial interest in the Note can be sold one or more times *without prior notice to Plaintiffs*, but any purported sale of a loan does not impact the rights or obligations of the parties thereto, including the right to foreclose. See *Bascos v. Fed. Home Loan Mortg. Corp.*, No. CV 11-39680-JFW (JCx), 2011 WL 3157063, at *6 (C.D. Cal. July 22, 2011); *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010). “[S]ecuritization merely creates ‘a separate contract, distinct from [p]laintiffs[’] debt obligations” under the note, and does not change the relationship of the parties in any way. *Reyes v. GMAC Mortg. LLC*, No. 11-0100, 2011 WL 1322775, at *3 (D. Nev. Apr. 5, 2011) (quoting *Commonwealth Prop. Advocates, LLC v. First Horizon Home Loan Corp.*, No. 10-CV-375, 2010 WL 4788209, at *2 (D. Utah Nov. 16, 2010)). Accordingly, Plaintiffs have failed to allege any prohibited conduct by Defendants to allege a violation of UCL.

F. Plaintiffs’ Claims for Wrongful Foreclosure Claim, To Set Aside The Foreclosure Sale, Cancellation of TDUS and Quiet Title All Fail As A Matter of Law

Plaintiffs allege that Defendants were not authorized to execute and record the ADOT, and that Defendants failed to follow the guidelines in Section 2924 such that the foreclosure sale is void. FAC ¶¶ 93-102. Plaintiffs also assert that the amount of money owed as indicated in both the NOD and NOTS was more than the amount actually owed. See FAC ¶ 95(a)-(b). Lastly, Plaintiffs claim that Defendants did not comply with Section 2934a or DOT Uniform Covenant 24 but fail to explain how they violated the statute, as set forth above in IV.B.1. FAC ¶ 96. Plaintiffs’ fifth cause of action follows their wrongful foreclosure claim in that they request the Court to vacate and set aside the trustee’s sale that took place over one year ago on November 5, 2012. FAC ¶¶ 103-110. Finally, Plaintiffs’ sixth and seventh claims seek to cancel the TDUS and Quiet Title to the Property. FAC

¶¶ 111-121. However, each of these claims fail because publically-recorded documents confirm that Defendants executed all recorded documents accurately and had the authority to foreclose, and additionally, Plaintiffs also fail to allege credible tender.

1. Plaintiffs' Failure To Allege Credible Tender Is Fatal To Their Claims

As a threshold matter, Plaintiffs cannot challenge the foreclosure proceedings, nor can they quiet title without first credibly alleging tender. “When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of *the amount of the secured debt* to maintain any cause of action for wrongful foreclosure.” *Alicea v. GE Money Bank*, 2009 WL 2136969, at *3 (N.D. Cal. 2009) (citing California law). This requirement applies to “any cause of action for irregularity in the sale procedure.” *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996). “To hold otherwise would permit plaintiffs to state a cause of action without the necessary element of damage to themselves.” *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 580 (1984). The rationale behind the rule is sound. “It would be futile to set aside a foreclosure sale on [technical grounds], if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property. Thus, it is sensible to require that a trustor, *whose default to begin with resulted in the foreclosure*, give proof before the sale is set aside that he now can redeem the property.” *Cold Storage*, 165 Cal. App. 3d at 1225 (emph. added).

Here, Plaintiff's defaulted on their loan and yet do not *credibly* allege they are able to tender the amount that was due under the loan. See generally FAC; see also Exh. C. Instead, Plaintiffs attempt to attack the amount of the arrearages listed on both the NOD and NOTS, but in doing so *they readily admit they were in default on their mortgage obligation*, in direct contravention of their DOT. See FAC ¶ 95(a)-(b); see also RJN, Exh. A. Plaintiffs attempt to allege that “they were prepared to tender the amounts due and owing...even though tender is not required.” FAC ¶109. Their clear misunderstanding of the law is readily apparent. The rule is clear that one seeking to challenge foreclosure must tender the amount of the secured debt, which as of the date of the TDUS recording was **\$373,955.64**. RJN, Exh. F. Because Plaintiffs do not allege *credible* tender of their unpaid debt, their fourth, fifth, sixth, and seventh claims for wrongful foreclosure, setting aside the trustee's sale, cancelling the TDUS and quieting title cannot survive.

2. Plaintiffs' DOT Specifically Allows For A Transfer Without Prior Notice

Plaintiffs challenge Defendants' authority to record the SOT, NOD, NOTS, and TDUS on the Property, as well as the Assignment of the DOT to Freddie Mac. FAC ¶¶ 46, 95(c), (e), 96, 98. However, as noted supra, the DOT explicitly provides that the Note or a partial interest in the Note “can be sold one or more times *without prior notice*” to Plaintiffs. RJN, Exh. A, p. 12, Uniform Covenant 20 (emphasis added). Thus, Plaintiffs were not entitled to notice that their loan would be or could be assigned to Freddie Mac. Similarly, Plaintiffs do not allege any facts to suggest that BANA, the original beneficiary under the DOT, was not authorized to substitute Quality Loan as trustee in March 2012. See *Civ. Code § 2924b(b)*.

Nor were Defendants obligated to record an assignment of the DOT to Freddie Mac, *though they did*. RJN, Exh. E; see also *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 120 (2011). In *Calvo*, the borrower sought to set aside a trustee's sale on the grounds that although the original lender assigned the loan to HSBC Bank, no assignment had been recorded in the public records. *Id.*, at 120-121. The Court affirmed the judgment dismissing the complaint on the grounds that *Section 2932.5*, which states that “[w]here a power to sell real property is given to a mortgagee, or other encumbrancer... [t]he power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded,” applies to mortgages, not deeds of trust. *Id.*, at 123; see also *Cal. Civ. Code § 2932.5*. Here, it is undisputed that the power of sale is conferred in the DOT. As such, it is irrelevant who holds the Note. See *Calvo*, 199 Cal. App. at 120, citing *Stockwell v. Barnum*, 7 Cal. App. 413,416 (1908). For these reasons as well, Plaintiffs' wrongful foreclosure claim continues to fail and should be dismissed in its entirety.

3. Plaintiffs Fail To Establish A Violation Of Section 2924

Plaintiffs' wrongful foreclosure claim also fails for the simple reason that they cannot allege that Defendants violated the nonjudicial foreclosure statutes. California's nonjudicial foreclosure framework, [Civil Code sections 2924-2924i](#), is exhaustive. See *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (1994). Under these statutes, if a DOT contains an express provision granting a power of sale, a “trustee, mortgagee or beneficiary or any of their authorized agents” may institute the foreclosure process. [Civ. Code § 2924\(a\)\(1\)](#) (emphasis added). Here, BANA properly substituted in Quality Loan as trustee via the SOT recorded on March 1, 2012. RJN, Exh. B. Plaintiffs utterly fail to describe with any particularity how Defendants purportedly violated Section 2934a. See FAC ¶¶ 23, 57, 96. Thereafter and upon Plaintiffs' *admitted* default on their loan, Quality Loan recorded the NOD on March 19, 2012. RJN, Exh. C. There can be no doubt that Quality Loan was also authorized to record the subsequent NOTS on June 27, 2012 upon Plaintiffs' failure to cure their default. RJN, Exh. D.

Regardless, California's non-judicial foreclosure scheme does not “provide for a judicial action to determine whether the person initiating the foreclosure is indeed authorized” to do so. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2011). In *Gomes*, a defaulting borrower sought declaratory relief from the court as to whether MERS, the nominee beneficiary under his deed of trust, was entitled to foreclose. *Id.* at 1151-52. The court held that California's exhaustive nonjudicial foreclosure scheme, [Civil Code Sections 2924-2924i](#), does not “provide for a judicial action to determine whether the person initiating the foreclosure is indeed authorized” to do so. *Id.* at 1155. In addition, the court held that the borrower expressly gave the defendants the authority to foreclose in the deed of trust, and thus was prohibited from challenging foreclosure on that basis as well. *Id.* at 1157-58. Because the judicially noticeable recorded documents confirm Defendants' authority to foreclose and compliance with the non-judicial foreclosure framework, Plaintiffs' wrongful foreclose and claim to cancel the foreclosure sale fail.

4. Plaintiffs Fail To Allege A Claim For Cancellation Of The TDUS

Plaintiffs' sixth claim for cancellation of the TDUS alleges that “Plaintiffs... obtained fee simple title to the... property by way of a [DOT]” and that the TDUS is void because it was procured by fraud and forgery. FAC ¶¶ 112, 114. However, not only do Plaintiffs fail to allege any specific facts suggesting that the TDUS was forged, but they fail to allege any of the elements required for a cancellation claim.

Cancellation of instruments is an equitable claim whereby the Court can declare an instrument void. [Civ. Code § 3412](#). To state a claim for cancellation, a plaintiff must allege: (1) there is a reasonable apprehension that the instrument left standing might cause serious injury; (2) the instrument is invalid on its face; (3) the instrument is void or voidable; (4) the instrument was in existence or under defendant's possession and control when the action was filed; and (5) if the interest is voidable rather than void, that they acted promptly to rescind. [Civ. Code § 3412, 3413](#); *Hironymous v. Hiatt*, 52 Cal. App. 727, 731 (1921). An instrument may be void or voidable on the following grounds: mental incapacity, minority, illegality, fraud, undue influence, duress, mistake, **abuse** of a confidential relationship, non-delivery of deed, and forgery. [Cal. Civ. Code §§ 40, 1569, 1575](#). A plaintiff must specifically allege the grounds on which the instrument is void or voidable. *Stevenson*, 65 Cal. App. 4th at 164.

Here, Plaintiffs simply contend, without any factual support, that the TDUS was procured by fraud and forgery. FAC ¶ 114. Their assertion is entirely conclusory, as Plaintiffs have not alleged any facts showing the TDUS is “void or voidable.” Moreover, Plaintiffs do not dispute their default. See FAC ¶ 95(a)-(b). They fail to allege any facts to show Defendants fraudulently or unlawfully recorded the TDUS, or that they did not have any arrearages on their account at the time the TDUS was recorded. Indeed, Plaintiff's have no basis to claim that the TDUS, a publically-recorded document with a notary sea affixed thereto, is void. Therefore, their cancellation claim fails entirely.

G. Plaintiffs' Claim For IIED Fails Entirely

Plaintiffs perfunctorily allege that “an attempt to collect an alleged debt by means of fraud or use of a false document has been held to be sufficiently outrageous to constitute an ‘outrageous act’ for purposes of this tort.” FAC ¶ 124. However, to state a claim for IIED, a plaintiff must allege: (1) extreme and outrageous conduct by the defendant with the intention of causing,

or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Cervantes v. J.C. Penny*, 24 Cal. 3d 579, 593 (1979). To be actionable, the conduct at issue must be “so extreme as to exceed all bounds of that usually tolerated in a civilized community.” *Davidson v. City of Westminster*, 32 Cal. 3d 197,209 (1982). Moreover, the “outrageous” conduct standard is so stringent that even where an alleged ethical violation has occurred, that conduct may be insufficient to satisfy the standard. See e.g., *Ross v. Creel Printing & Publ ‘g Co.*, 100 Cal. App. 4th 736, 746 (2002).

Plaintiffs' FAC falls far short of this high bar. Plaintiffs simply allege in a conclusory manner that Defendants engaged in “outrageous acts,” with absolutely no supporting evidence. FAC ¶ 124. Plaintiffs fail to specify what conduct they are asserting as “extreme and outrageous.” Instead, Plaintiffs apparently assert that the foreclosure sale itself constituted intentional infliction of emotional distress. See, e.g., FAC ¶ 124 (“Plaintiffs may also obtain damages for emotional distress in a wrongful foreclosure action.”) This allegation wholly fails to demonstrate conduct that “exceeds all bounds of that usually tolerated in a civilized society.” *Davidson*, 32 Cal. 3d at 185. In short, Plaintiffs allege no facts regarding Defendants' conduct that could reasonably be regarded as extreme and outrageous. Therefore, Plaintiffs' IIED claim fails and should be dismissed without further leave to amend.

H. Plaintiffs' Elder Abuse Claim Is Inadequately Pled

Plaintiffs' claim for elder financial abuse alleges that Defendants' purported fraudulent foreclosure sale constitutes elder financial abuse. See FAC ¶¶126-131. However, under the Elder Abuse and Dependent Adult Civil Protection Act (“Elder Abuse Act”)⁴, elder financial abuse occurs when a person or entity “[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use⁵ or with intent to defraud, or both.” Wel. & Inst. Code § 15610.30 subd. (a)(1); see also *id.* at § 15610.30 subd. (c).⁶ A person or entity that “assists” in the foregoing conduct, or does the foregoing through the use of undue influence, as defined in Section 1575 of the Civil Code, is also liable under the Act. See *id.* at § 15610.30 subds. (a)(2)-(a)(3). A plaintiff must plead a violation of the Elder Abuse Act with particularity. See *Covenant Care, Inc. v. Super. Ct.*, 32 Cal. 4th 771, 790 (2004). But, Plaintiffs allege no facts whatsoever to show how Defendants had the “intent to defraud” Plaintiffs. To the extent Plaintiffs attempt to base this claim on their others, it necessarily fails. See fn. 4 and Demurrer generally. Plaintiffs cannot allege that Defendants have wrongfully taken, secreted, appropriated, obtained, or retained the Property because they were authorized to foreclose sale pursuant to the terms of the DOT and Plaintiffs' admitted default on their loan. See *RJN, Exhs. A, C*; see also FAC ¶ 95(a)-(b). Further, Plaintiffs fail to plead facts that show premeditated effort, that Defendants erroneously or wrongfully took any of Plaintiffs' money or the Property. See generally FAC. Thus, Plaintiffs' claim fails entirely.

I. Plaintiffs' Declaratory Relief Claim Fails Because There Is No Actual Controversy

Plaintiffs claim that declaratory relief is needed because “an actual controversy has arisen and now exists between Plaintiffs and Defendants concerning their respective rights [and] responsibilities... with regard to the [Property]...” FAC ¶ 133. However, declaratory relief is proper only where there exists an “actual controversy relating to the legal rights and duties of the respective parties.” Code Civ. Proc. § 1060; see also *Ratcliff Architects v. Vanir Constr. Mgmt.*, 88 Cal. App. 4th 595, 607 (2001). Courts emphasize that the “fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.” *City of Cotati v. Cashman*, 29 Cal. 4th 69, 79 (2002). When a declaratory relief action merely duplicates other untenable causes of action, it should be dismissed at the pleading stage. See *Ratcliff Architects*, 99 Cal. App. 4th at 607; *Brittain*, 2009 WL 2997394, at *5. Here, for all of the reasons discussed in this demurrer, Plaintiffs have failed to allege a viable claim and therefore cannot allege an “actual controversy.” Moreover, speculative requests for declaratory relief are inconsistent with California's exhaustive non-judicial foreclosure scheme and have been rejected by the courts. See section IV.F.3, *supra*.

V. CONCLUSION

Plaintiffs' FAC still fails to state a single cause of action against Defendants. Because there is no indication that Plaintiffs are able to cure the deficiencies in their FAC, Defendants respectfully request that this Court dismiss the FAC in its entirety, without leave to amend, and dismiss this action with prejudice.

DATED: March 25, 2014

REED SMITH LLP

By:

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Attorneys for Defendants Federal Home Loan Mortgage Corporation and Bank of America, N.A.

Footnotes

- 1 "Clear intent" is not shown "by a contract's recitation of interested constituencies.... or even a showing that the contract 'operates to the [third parties'] benefit and was entered into with [them] in mind.'" *County of Santa Clara*, 588 F.3d at 1244. Rather, the precise language of the contract must show a clear intent to confer such a benefit and "to rebut the presumption that the [third parties] are merely incidental beneficiaries." *Id.*
- 2 See also *Argueta v. JP Morgan Chase Bank, N.A.*, No. 11-CV-441, 2011 WL 2619060, at *5 (E.D. Cal. June 30, 2011) (Plaintiffs' allegations about the loan modification application process are insufficient to plausibly suggest that defendants owed plaintiff a duty of care); *DeLeon v. Wells Fargo Bank, N.A.*, No. 10-CV-1390, 2010 WL 4285006, at *4 (N.D. Cal. Oct. 22, 2010) (finding that defendant did not have a duty "to complete the loan modification process").
- 3 A party's interest in a loan is not lost by assignment of the Note and DOT to a loan pool. *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) ("[T]he argument that parties lose their interest in a loan when it is assigned to a trust pool has... been rejected by many district courts."); *Logvinov v. Wells Fargo Bank*, No. XXXXXXXXXXXXX DMR, 2011 WL 6140995, at *3 (N.D. Cal. Dec. 9, 2011); *Canales v. Fed. Home Loan Mortg. Corp.*, No. CV 11-2819 PSG (VBKx), 2011 WL 3320478 (C.D. Cal. Aug 1, 2011).
- 4 Some courts take the position that a claim under the **Elder Abuse** Act is derivative and depends on successfully pleading another cause of action. *Berkley v. Dowds*, 152 Cal. App. 4th 518, 529 (2007). Other courts take the position that the **Elder Abuse** Act "creates an independent cause of action." *Perlin v. Fountain View Management, Inc.*, 163 Cal. App. 4th 657, 666 (2008).
- 5 A person or entity is deemed to have done the foregoing "'for a wrongful use' if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult." *Id.* at § 15610.30 subd. (b).
- 6 **Wel. & Inst. Code § 15610.30 subd. (c)** provides: "[f]or purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult." *Id.* According to the legislative history, this subdivision and subdivision (a)(3) were added in 2008 to "clarify certain ... ambiguities in the **financial abuse** provisions of [the **Elder Abuse** Act]." Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1140 (2007-2008 Reg. Sess.), as amended Mar. 10, 2008, pp. 3, 11.